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IN THE

# Supreme Court of the United States

October Term, 1963

No. 699

SHAFFIQ KASSAB,

*Petitioner,*

*vs.*

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 24, 1963.

### Citation to Opinion Below.

The opinion of the court of appeals [R. 21-25][1] is printed in Appendix B, *infra*. It is reported at 322 F.2d 824.

### Jurisdiction.

The judgment of the court of appeals was entered on September 24, 1963 [R. 26]. It is printed in Appendix C, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

[1] "R." refers to the transcript of record in the Court of Appeals; "AR." refers to the separately page-numbered administrative record.

## Questions Presented.

1. Under §106(a)(1) of the Immigration and Nationality Act, which provides that a petition for judicial review may be filed not later than six months after the date of a "final deportation order,"

(a) Is an alternative deportation order which does not specify an effective date or a country of destination a "final deportation order" so that a petition for review must be filed within six months after its date, or

(b) Does such an order become final when supplemented by a subsequent notice directing deportation on a date certain and to a named country, so that a petition for review may be filed within six months after the date of such notice?

2. Is judicial review of orders ancillary to a deportation order precluded by the doctrine of exhaustion of administrative remedies for failure to prosecute an administrative appeal

(a) Where the prior order did not specify an effective date or a country of destination, and

(b) Where the alien contends that his "consent" to "voluntary" deportation and consequent waiver of the right to appeal from the prior order procured by threat of wrongful deportation?

## The Statutes and Regulations Involved.

The statutes and regulations involved are: §106, subsections (a) and (c), of the Immigration and Nationality Act (8 U. S. C. A. §1105a, 75 Stat. 651), and certain administrative regulations: 8 C. F. R. §§3.1(b),

242.18, and 242.20 (22 F. R. 9798, as amended by 23 F. R. 9123, and 23 F. R. 9117). The pertinent portions of the statutes and regulations are printed in Appendix A, *infra*.

## Statement.

Petitioner is a native of Iraq, a citizen of Israel, and a resident of the United States.

On January 12, 1959, respondent approved an application by petitioner's wife (then occupying the status of an alien admitted to permanent residence in the United States) for the issuance of an immigrant visa to petitioner [R. 2]. Petitioner last entered the United States on or about June 1, 1959, under a visitor's permit; however, he contends that the approval of the application for issuance of an immigrant visa to him entitles him to remain in the United States (*Cf. Roumeliotis v. Immigration and Naturalization Service* (C. A. 7), 304 F. 2d 453, 455).

Petitioner took up residence in the United States with his wife and minor child, who is a native-born citizen of the United States. Respondent instituted proceedings to rescind the permanent resident status previously acquired by petitioner's wife, and respondent also instituted proceedings to deport petitioner, ostensibly for overstaying his visitor's permit, but actually (petitioner contends) in consequence of respondent's prior determination to proceed against petitioner's wife.

Petitioner appeared at a deportation hearing before respondent's special inquiry officer on February 7, 1961. Petitioner then signified his consent to "voluntary" departure in lieu of deportation and waived his right of

administrative appeal. He contends that he did so under threat of wrongful deportation. The special inquiry officer made an order "that in lieu of deportation [petitioner] be granted voluntary departure . . . within such time and under such conditions as the district director shall direct" and that failing such departure, petitioner should "be deported from the United States in the manner provided by law . . ." [AR. 3-5]. No date of departure or country of destination was then specified.

On December 18, 1961, respondent notified petitioner that if he failed to depart by August 1, 1962, or any authorized extension thereof his deportation to Israel had been directed [R. 7]. The time for petitioner's departure was extended by successive extensions, the latest of which expired March 3, 1963 [R. 2].

On May 3, 1963, petitioner filed in the court of appeals his petition for review of deportation order, directed to respondent's notice dated December 18, 1961, alleged to be a final deportation order effective March 3, 1963 [R. 1-8]. The petition was filed more than six months after the date of the order of February 7, 1961, but less than six months after the latest effective date and the latest notice by which such effective date was announced.

The petition for review was denied. The court of appeals held: (1) that the petition for review was untimely because it was filed more than six months after the order of February 7, 1961; and (2) that judicial review was precluded because of petitioner's failure to take an administrative appeal from the order of February 7, 1961.

## Reasons for Granting the Writ.

1. The decision of the court of appeals in the instant case probably conflicts in principle with the recent decision of this Court in *Foti v. Immigration and Naturalization Service*, No. 28, this Term, decided December 16, 1963, reversing (C. A. 2), 308 F. 2d 779. (The text of this Court's opinion in the *Foti* case is not yet available to us at the time when the copy for this petition must go to the printer in order for the petition to be filed within the time required).

In the instant case, respondent cited the (now revised) *Foti* decision to the court of appeals in support of respondent's contention that the words "final deportation order" in §106(a) should be narrowly construed. In the *Foti* case the alien had applied to the Attorney General for suspension of a prior deportation order. The application was denied. The court of appeals for the Second Circuit held that denial of the application was not reviewable as a final deportation order. This Court reversed. Although this Court's opinion in the *Foti* case is not yet available to us, this Court must have approved an expanded rather than a narrow reading of the words "final deportation order" in §106(a).

2. The decision of the court of appeals in the instant case conflicts in principle with the decisions of the court of appeals for the Seventh Circuit in *Blagaic v. Flagg* (C. A. 7), 304 F. 2d 623 and *Roumeliotis v. Immigration and Naturalization Service* (C. A. 7), 304 F. 2d 453.

The *Blagaic* case, like the *Foti* case, involved review of a decision denying an application for stay of de-

portation. In the *Biagaic* case the court pointed out that the denial of the application for suspension was

> "ancillary to the [deportation] order. If the withholding of deportation is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is part of the deportation order" (304 F. 2d 625).

In the *Roumeliotis* case, as here, deportation was ordered on the ground that the alien had overstayed his visitor's permit. He applied for a first preference immigrant visa, which was refused, and he sought judicial review of that decision. The court pointed out that if the application for immigrant visa "had been granted, it would have, in effect, nullified the deportation orders; therefore, the determination on the petition for the visa is in a realistic sense part of the deportation orders" and hence reviewable as such (304 F. 2d 455).

In the instant case, respondent's notice specifying the country of destination and the departure date was ancillary to the original deportation order, which did not supply either of those necessary elements. Accordingly, the notice should be judicially reviewable as were the orders in the *Biagaic*, *Roumeliotis*, and *Foti* cases.

3. The conflict of decisions referred to above concerns the question whether orders made subsequent to an initial deportation order may be reviewable as final deportation orders. In yet another respect the decision of the court of appeals in the instant case conflicts in principle with the Seventh Circuit decision in the *Roumeliotis* case, *supra*.

In the *Roumeliotis* case, as here, the alien had not prosecuted an administrative appeal from the prior de-

portation order, and the Government contended that judicial review of a subsequent order was precluded by reason of the alien's failure to exhaust his administrative remedies. In the instant case the court of appeals agreed with the Government's contention as an alternative ground of decision. But the decision in the *Roumeliotis* case is to the contrary. In reference to the Government's contention the court there said:

> "The difficulty with this argument is that while the review in the instant case relates to the orders of deportation, it concerns a proceeding that is ancillary to the orders; in other words, the petition for review is not a direct attack upon the orders per se" (304 F. 2d 455).

As this Court recognized when it granted the writ of certiorari in the *Foti* case, these questions are of public importance. The writ should therefore be granted in this case and the judgment of the court of appeals should be summarily reversed on the authority of the *Foti* decision, or else the cause should be set down for argument on the merits.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

MURRAY M. CHOTINER,
PATRICK J. HILLINGS,
By MURRAY M. CHOTINER,
*Counsel for Petitioner.*

## APPENDIX A.

### Statutes and Regulations Involved.

*Immigration and Nationality Act* (8 U. S. Code Sec. 1105a, 75 Stats. 651):

Sec. 106(a) (1): a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later . . .

Sec. 106(c): An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . . .

*Regulations:*

8 C. F. R. Sec. 242.18 (22 F. R. 9798): The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without examination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

8 C. F. R. Sec. 242.20 (22 F. R. 9798, as amended by 23 F. R. 9123): The order of the special inquiry officer shall be final except when the case has been certified as provided in Part 3 or Part 103 of this chapter, or an appeal is taken to the Board of Immigration Appeals, by the respondent or by the examining officer.

8 C. F. R. Sec. 3.1(b) (23 F. R. 2117): Appeals shall lie to the Board of Immigration Appeals from the following: . . .

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

## APPENDIX B.

### (Opinion).

United States Court of Appeals for the Ninth Circuit.

Shaffiq Kassab, *Petitioner*, vs. Immigration and Naturalization Service, *Respondent*. No. 18,650.

Sept. 24, 1963.

Petition to Review an Order of the Immigration and Naturalization Service.

Before: Barnes and Jertberg, Circuit Judges; and Stephens, Jr., District Judge.

Barnes, Circuit Judge:

This is an appeal from several orders of the Immigration and Naturalization Service requiring that petitioner either voluntarily depart from the United States or be involuntarily deported pursuant to a previous order of deportation.

Petitioner is an alien, a native of Iraq, and a citizen of Israel. He last entered the United States at New York, New York, on or about June 1, 1959, at which time he was admitted *as a nonimmigrant for pleasure* and was authorized to remain in the United States as a nonimmigrant until January 7, 1961.

On January 19, 1961, an Order to Show Cause and Notice of Hearing was issued by the Immigration and Naturalization Service, charging that petitioner was subject to deportation pursuant to the following provisions of law:

> "Section 241(a) (2) of the Immigration and Nationality Act [8 U.S.C. § 1251(a) (2)], in that, after admission as a non-immigrant under Section 101(a) (15) of said Act [8 U.S.C. § 1101(a) (15)] you have remained in the United States for a longer time than permitted."

Pursuant to the aforementioned Order to Show Cause, a deportation hearing was held at Los Angeles, California, on February 7, 1961. At this deportation hearing petitioner admitted the truth of the allegations in the Order to Show Cause, and admitted his deportability on the charge therein contained.

At this deportation hearing petitioner made an oral application that he be granted voluntary departure. Evidence was received with respect to this application, following which the special inquiry officer rendered an oral decision which included the following order:

> "ORDER: IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the district director shall direct.
>
> IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States in the manner provided by law on the charge contained in the Order to Show Cause."

Petitioner has not voluntarily departed. He is still in the United States.[1]

[1]By letter of June 15, 1961, the Immigration and Naturalization Service advised Petitioner that since a private bill was being considered by the Congress in his behalf, no steps would be taken to enforce his departure until August 1, 1962 (Ex. A-1). By letter of December 18, 1961, the Service informed petitioner that if did not depart by August 1, 1962, his deportation has

He has not appealed from that order, except by this proceeding.

Later in 1961, Congress saw fit to pass Public Law 87-301. Section 5(a) thereof became 8 U.S.C.A. § 1105a. It related to judicial review of orders of deportation and exclusion, and set up an exclusive procedure. It gave exclusive jurisdiction for any appeal from any order of deportation to the court of appeals of the circuit in which the administrative proceeding before the special inquiry officer took place.

It also provided that any petition for review was required to be filed "not later than six months from the date of the final deportation order, or from the effective date of this section, whichever is the later."

The final order deporting petitioner was dated February 7, 1961. While petitioner was notified "no steps would be taken to enforce his departure" on two occasions (see note 1, *supra*), such letters did not change the finality of the deportation order against him.

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been directed to the country indicated in the attached Form . . ." (Israel. Ex. A-2 and A-3.) By letter of June 15, 1962, the Service informed petitioner that since a private bill in his behalf was being considered by the Congress, he would be permitted to remain in the United States until February 4, 1963, or 30 days following adverse action on the bill, whichever occurred sooner (Ex. A-4). His time was extended until March 3, 1963.

The Immigration and Naturalization Service notified petitioner by letter of March 25, 1963, that he was to be deported to Israel, and that he would be notified when arrangements for his departure had been completed. By a letter of April 3, 1963, petitioner was notified by the Service that arrangements had been made for his departure on April 9, 1963, and that he was to report to an Immigration Officer at a certain time and place on that date, prepared to depart. Petitioner apparently did not arrive at the appointed place and hour and thus did not depart.

The statute mentioned was passed by Congress on September 26, 1961, and became effective October 26, 1961. Six months later was April 26, 1962. No petition was filed until May 3, 1963. Very clearly we have no jurisdiction to consider petitioner's petition to review his own final order of deportation.

Not only has petitioner not come within the provisions of law as to time, he has failed to exhaust his administrative remedies. Section 1105a(c) of Title 8, United States Code, prohibits this court from considering his appeal from his own deportation order under such circumstance. *Cf. Siaba-Fernandez v. Rosenberg*, 9 Cir. 1962, 302 F.2d 139.

Petitioner seeks relief from the provisions of the statute by alleging that respondent's letter-notice to petitioner, dated December 18, 1961 was "in legal effect a final deportation order, effective March 3, 1963." That letter (Exhibit A attached to petition) merely gave petitioner a new date of departure. This court has already ruled such a notice of departure date is not a "final order of deportation." *Mai Kai Fong v. Imm. & Nat. Service*, 9 Cir. 1962, 305 F.2d 239. This court has consistently followed what might be called the narrow view of the statute; a view which remains the majority view of the various circuits, and corresponds more closely, in our opinion, to congressional intent. Such "letters" are "orders pursuant to 8 U.S.C. §1253, subsequent to entry of the final order of deportation." *Mai Kai Fong v. Imm. & Nat. Service, supra. Cf.*

also: *Murillo-Aguilera v. Imm. & Nat. Service*, 9 Cir. 1962, 313 F.2d 141; *Arreche-Barcelona v. Imm. & Nat. Service*, 9 Cir. 1962, 310 F.2d 690; *Holz v. Imm. & Nat. Service*, 9 Cir. 1962, 309 F.2d 452; *Giova v. Rosenberg*, 9 Cir. 1962, 308 F.2d 347.

Further, under Section 242(b) of the Immigration and Nationality Act, only special inquiry officers can issue orders of deportation. No special inquiry officer signed the December 18, 1961 letter. It was not an order of deportation.

Petitioner next seeks to avoid the effect of the lack of jurisdiction and his failure to exhaust his administrative remedies by urging that his consent to voluntary departure was not voluntarily given, but "coerced." We find no merit in this suggestion. Petitioner was represented by counsel of his own choice, and has not to this date denied the truth of the admissions he made to the charges filed against him, as a result of which he was ordered deported, as required by law.

Finally, petitioner seeks to avoid his own order of deportation because of his wife's "Petition by Permanent Resident Alien for Issuance of Immigrant Visa," filed December 12, 1958, by her on his behalf. Petitioner is incorrect in asserting he "was granted an immigration visa on petition of his wife." Her action gave him a preferred status under Section 203(a) (3) of the Immigration and Nationality Act, which might have aided him had he sought to obtain a visa to enter this country. Instead, he preferred, for reasons of his

own (as explained at his hearing when he sought voluntary departure), to apply for an immigrant visa, but not to follow through on such application, and to follow a different procedure for coming into this country, *i.e.*, as a visitor. He was admitted to the United States a second time as a *nonimmigrant visitor* for pleasure only. (R. 23-28.) He was deportable by reason of overstaying his leave as such nonimmigrant visitor;[2] that was the only charge placed against him, and his wife's difficulties[3] had nothing to do with *his* deportation; and cannot prevent it.

The order of deportation outstanding against petitioner is upheld for the reason hereinabove set forth. The petition is denied.

(Endorsed) Opinion Filed Sept. 24, 1963.

Frank H. Schmid, Clerk.

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[2] *Mesina v. Rosenberg*, 9 Cir. 1940, 278 F. 2d 204.

[3] On March 13, 1962, the status of permanent residence granted the wife on November 12, 1958, was rescinded (8 U.S.C. § 1182(a)) and she was ordered deported (8 U.S.C. § 1251) after hearing, and appeal to the Board of Immigration Appeals.

## APPENDIX C.

### (Judgment).

United States Court of Appeals for the Ninth Circuit.

Shaffiq Kassab, Petitioner, vs. Immigration and Naturalization Service, Respondent. No. 18050.

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition to review an order of the said Immigration and Naturalization Service in this Cause be, and hereby is denied, and the order of deportation is upheld.

Filed and entered: September 24, 1963